

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

Kevin Richard Hevel,
Petitioner,

v.

Charles L. Ryan, *et al.*,
Respondents.

No. CV-19-04866-PHX-JJT (MHB)

ORDER

Kevin Richard Hevel (“Petitioner”) filed a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 (Doc. 1). Now at issue is the Report and Recommendation (Doc. 25, “R&R”) submitted in this matter by United States Magistrate Judge Michelle Burns and recommending the Court deny and dismiss the Petition with prejudice. Petitioner timely filed Objections to the R&R (Doc. 26), and Respondents filed a Reply thereto (Doc. 27). The Court will adopt the R&R in whole, including its reasoning, overrule the Objections, and dismiss the Petition.

Judge Burns exhaustively and correctly analyzed the two sub-parts¹ of the ineffective assistance of counsel (IAC) claim Petitioner raised in his Petition. As to subpart one, wherein Petitioner urges that trial counsel provided IAC through his alleged failure to attend a mitigation hearing on July 11, 2018, two days before his sentencing hearing, Judge Burns found first, as a procedural matter, that the state court denied this claim “by invoking an adequate and independent state rule,” and thus sub-part one was procedurally defaulted.²

¹ In his Petition, Petitioner raised a third sub-part of his ineffective assistance claim, arguing it was a cause of his potentially untimely filing of the Petition. Respondent’s acknowledgement that the Petition was timely (Doc. 22) moots that sub-issue, as Judge Burns recommends.

² To the extent Petitioner raises counsel’s failure as excuse for procedural default of this sub-part of his IAC claim pursuant to *Martinez v. Ryan*, 566 U.S. 1 (2012), Judge Burns

1 (R&R at 11.) With regard to Petitioner’s substantive complaint in sub-part one, Judge
2 Burns noted, as did the state court, that the docket confirms there was no mitigation hearing
3 on July 11, 2018, (Doc. 22 Exh. N), and Petitioner was represented at his sentencing
4 hearing on July 13, wherein the sentencing court did consider mitigation information as
5 reflected in the pre-sentence report. And the Court agrees with Judge Burns that even if
6 trial counsel failed to present 26 character letters from friends and family at sentencing or
7 before, such a bare assertion does not establish prejudice. The Court finds no reasonable
8 probability that the sentence would have been different but for the alleged omission of the
9 letters, as would be necessary for Petitioner to show prejudice under *Strickland v.*
10 *Washington*, 466 U.S. 668, 686-87 (1984).

11 As to sub-part two of Ground One, again Judge Burns correctly concluded that
12 Petitioner’s claim failed on the merits. Petitioner argued that he received IAC when counsel
13 failed to advise him of his appeal rights and falsely informed him that by signing the plea
14 agreement he waived his right to appeal though he still had a right to file a petition for state
15 post-conviction relief (PCR). The record before the Court shows conclusively that
16 Petitioner was advised at his sentencing that while he had waived his right to appeal by
17 pleading guilty to a noncapital offense, he had a right to a petition for post-conviction relief,
18 and if he wished to exercise that right he had to file a Notice of PCR within 90 days of
19 entry of judgment and sentence. (Doc. 22 Exh. F.) Petitioner signed the receipt of that
20 notice at his sentencing. (Id.) He thus was “unambiguously notified of the time limit to
21 seek post-conviction relief and does not assert that counsel promised to file a notice on his
22 behalf or that he was otherwise prevented from timely seeking post-conviction relief,” as
23 the state appellate court found on PCR review. (Doc. 22 Exh. P.) In light of this
24 unambiguous notice which Petitioner acknowledged in writing upon receipt, Petitioner

25 _____
26 correctly rejected that argument. (R&R at 15-16.) Petitioner disagrees with that conclusion
27 in his Objections but fails to state why Judge Burns’s analysis under *Martinez* was wrong—
28 he simply, and conclusorily, repeats that his IAC claims “are substantial pursuant to
Dietrich.” (Doc. 26 at 8-9.) That is not sufficient. *See, e.g., Sosnowics v. Shinn*, CV-20-
00040-DGC, 2021 WL 2685652 at *3 (D. Ariz. June 30, 2021) (“merely reasserting the
grounds of the petition as an objection provides this Court with no guidance as to what
portions of the R&R Petitioner considers to be incorrect.”)

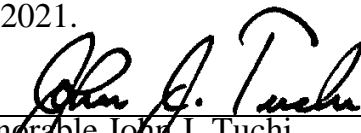
1 must show prejudice under *Strickland* for any failure by his counsel to tell him he had a
 2 right to file for PCR review. This he fails to do, for all the reason Judge Burns discusses in
 3 the R&R, and particularly on pages 11-13. In his Petition, Petitioner attempts to overcome
 4 this barrier by listing a number of actions he attributed to trial counsel beyond failure to
 5 advise him of his PCR review right; he repeats these assertions in his Objections. But Judge
 6 Burns correctly observed that Petitioner's "unsupported and conclusory statements"
 7 regarding appeal advice and other alleged errors are insufficient to establish the occurrence
 8 of such an incident and to overcome *Strickland*'s highly deferential standard for scrutiny
 9 of counsel's performance. (R&R at 13, citing *Greenway v. Schriro*, 653 F.3d 199, 204 (9th
 10 Cir. 2011)). This is especially so when such clear proof exists that Petitioner had notice of
 11 his PCR rights and the time requirements to exercise them. In sum, Petitioner can show
 12 neither deficient performance by counsel nor prejudice arising from it.

13 **IT IS ORDERED** overruling Petitioner's Objections (Doc. 26) and adopting the
 14 R&R (Doc. 25) in whole.

15 **IT IS FURTHER ORDERED** denying and dismissing with prejudice the Petition
 16 for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 (Doc. 1).

17 **IT IS FURTHER** ordered denying a certificate of appealability and motion for
 18 leave to proceed *in forma pauperis*. Dismissal of part of the Petition is justified by a plain
 19 procedural bar upon which jurists of reason would not find the Court's ruling debatable.
 20 Dismissal of the remainder of the Petition is based on a finding that Petitioner has not made
 21 a substantial showing of the denial of a constitutional right, and Petitioner has not
 22 demonstrated that jurists of reason could disagree with the resolution of his constitutional
 23 claims or that they could conclude those issues are adequate to deserve encouragement to
 24 proceed further. *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2007).

25 Dated this 15th day of November, 2021.

26 
 27 Honorable John J. Tuchi
 28 United States District Judge